No. S266034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LISA NIEDERMEIER,

Plaintiff and Respondent,

v.

FCA US LLC,

Defendant and Appellant.

California Court of Appeal, Second District, Division One
Civil No. B293960
Appeal from Los Angeles County Superior Court
Case No. BC638010
Honorable Daniel Murphy

PETITIONER'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Does the Song Beverly Act's statutorily defined restitution remedy include an unstated, unenumerated offset for a trade-in credit?

2. If the amount that a consumer has received in a trade-in transaction must be subtracted from the consumer's recovery, should that amount be taken from the Act's statutorily defined restitution remedy or should it instead be subtracted from the consumer's total recovery—that is, so that the calculation of civil penalties (and the policy underlying them), remains unaffected?

INTRODUCTION

The Song-Beverly Consumer Warranty Act (Act), Civil Code section 1790 et seq., obligates car manufacturers to promptly buy back defective new cars and brand them as lemons after multiple repair attempts have failed.[1]

Manufacturers who fail to buy back or repair lemon vehicles promptly are required to "make restitution in an amount equal to the actual price paid or payable by the buyer," less certain offsets *not* including the lemon's trade-in value. (§ 1793.2, subd. (d)(2).) In addition, if the buyer establishes that the manufacturer's "failure to comply was *willful*," the judgment may include "a civil penalty which shall not exceed two times the amount of actual damages." (§ 1794, subd. (c), italics added.)

Here, respondent FCA US, LLC ("Chrysler") violated the Act by refusing to buy back petitioner Lisa Niedermeier's lemon despite *sixteen* failed repair attempts and *three* buy-back requests. Chrysler's refusal forced Niedermeier to take matters into her own hands. She sued Chrysler and, during the course of her two-year lawsuit, traded in her dangerous lemon in order to purchase a safe, reliable vehicle. The dealer that sold her the new car gave her a $19,000 trade-in credit for the lemon.

A jury found that Chrysler *willfully* violated its statutory obligations to promptly buy back her vehicle, awarding a civil

[1] All further statutory references are to the Civil Code unless indicated.

penalty for that willful misconduct in addition to statutory restitution remedies and compensatory damages.

In the wake of the verdict, Chrysler sought an offset for the amount of the trade-in credit for Niedermeier's lemon, even though the Act's plain language does not permit one. The trial court rejected Chrysler's improper request, but the Court of Appeal construed the Act as requiring an unstated trade-in offset that no other court has recognized.

Not only did this ruling reward Chrysler for its willful violations of the Act, but the Court of Appeal compounded the benefit to Chrysler by applying the offset to reduce the base amount for calculating the civil penalty—thereby giving Chrysler a multiplied offset, instead of applying the offset to the petitioner's total recovery *after* calculating the penalty.

This was error.

The Court of Appeal's decision is directly contrary to the Act's plain language, which unambiguously does not allow *any* offset for a trade-credit. That alone is reason enough to reverse.

But beyond that, the court's ruling flies in the face of the Act's principal *raison d'etre*: to protect buyers and the public from dangerous vehicles by requiring manufacturers to *promptly* repair or repurchase lemons. Letting manufacturers deduct a trade-in credit from a buyer's damages actually *encourages* manufacturers to refuse to buy back the vehicle. This leaves consumers with no other option but to sue, thereby increasing the likelihood that the buyer will trade in her lemon to get a safe

car—and thereby rewarding violators like Chrysler for their willful refusals to buy back lemons. This turns the statutory scheme on its head.

The court's decision was based on its theory that disallowing a trade-in offset would incentivize buyers to trade in their lemons, thereby granting buyers a windfall and potentially putting more un-branded lemons on the road. That rationale gets things exactly backwards. In reality, allowing a trade-in offset would *increase* the odds that lemons will be reintroduced into the marketplace without proper branding, thereby directly undermining the Act's branding regime, which places the lemon-branding requirement squarely on the manufacturers.

The Legislature decided that the best way to keep lemons off the road is to require *manufacturers* to *promptly* buy them back *in the first place*, and then brand them as lemons before any re-sale. A trade-in offset would vitiate that goal, promote delay, and violate the Act's plain language to boot.

If the Court disagrees, however, and holds that the Act permits a trade-in offset despite its plain language, then the Court should minimize the detriment to consumers by disallowing the offset to manufacturers like Chrysler who *willfully* violate the Act, thus limiting the offset to manufacturers who act in good faith. Doing so would reduce the perverse incentives for bad actors like Chrysler to violate the Act by ensuring that willful violators feel the full impact of the Act's civil penalty provision, which is designed to punish willful

violators by imposing an additional penalty of up to two times actual damages. Indeed, deducting the trade-in offset from actual damages *before* they are doubled for willful violators would reward exactly those violators the Legislature singled out for punishment—an obviously impermissible result.

At the very least, the Court should make clear that any trade-in offset may only be deducted *after* the jury calculates the civil penalty for willful misconduct. Any other approach would afford willful wrongdoers as much as a *triple* offset for a trade-in credit, thereby further incentivizing manufacturers to breach their affirmative obligation to promptly buy back lemons—and further undermining the Act's core purpose of protecting consumers and the public from dangerous lemons and punishing willful violators of the Act. At a minimum, this Court should reject that aberrant result.

STATEMENT OF THE CASE

A. Statutory Background.

The Legislature adopted the Song-Beverly Consumer Warranty Act (the "Act") in 1970 to address rampant problems with enforcing consumer warranties for new products. (See 1MJN/1–2MJN/588 [legislative history materials].)[2] The Act "is

[2] Concurrently with this brief, Petitioner has filed a Motion for Judicial Notice (MJN) requesting judicial notice of nine volumes of legislative history materials for the Act and relevant

strongly pro-consumer." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 (*Murillo*).)

Because existing remedies did not sufficiently protect consumers when manufacturers refused to comply with their warranties, the Legislature provided (in former Civil Code section 1793.2) that when a manufacturer cannot repair a defective new product, it "*shall* either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to discovery of the defect." (See 1MJN/30, italics added.) The Legislature later added that these obligations arose "after a reasonable number" of unsuccessful repair attempts. (3MJN/590-591.)

As it turns out, however, section 1793.2's open-ended language—including the statute's failure to specify when or how replacement or reimbursement should occur; how to calculate the "purchase price"; how to determine the "use" offset; and what constitutes a "reasonable number" of repair attempts—failed adequately to protect buyers of new motor vehicles. By the early 1980's, "[r]efunds and replacements of new cars [we]re rare," because car manufacturers demanded "endless opportunities to correct defects" in the vehicle and "never admit[ted], perhaps because of the cost of the vehicle" that they had a duty "to replace

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amendments, plus a state agency opinion letter. This brief cites this material as "[volume]MJN/[page]."

it or reimburse the consumer." (See 3MJN/615-618, 637, 646-647, 745, 751, 754, 784.)

The Legislature responded in 1982 by enacting amendments known as "the lemon law," in an "effort to provide more meaningful protection for new car buyers" who were stuck with lemons—that is, new cars that "don't work and can't be fixed within a reasonable time." (3MJN/759, 790-791; 4MJN/922; see *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 123.) The lemon law created a presumption that a "reasonable" number of repair attempts is four, or 30 cumulative days out of service, during a specific period, and added provisions for third-party dispute resolution. (3MJN/610-611.)[3]

Over the next five years, however, vehicle manufacturers continued to take advantage of section 1793.2's ambiguities by, for example, refusing to provide adequate refund amounts, saddling buyers with excessive charges, and imposing excessive offsets for buyers' use of their cars while waiting for manufacturers to provide them relief. (4MJN/997; 5MJN/1400-1402 [Department of Justice bill analysis: "[t]he existing lemon law . . . has not worked well"].)

The Legislature responded in 1987 by completely revamping section 1793.2 to specify detailed, comprehensive replacement/reimbursement provisions *just for lemon vehicles*—the provisions at issue in this appeal. (3MJN/828-8MJN/2179; see also 4MJN/1137 ["This bill will invigorate the existing

[3] Today, section 1793.22 contains the operative presumptions.

automobile 'lemon' law which has not provided an adequate remedy to buyers of defective new cars"].)

The purpose of the 1987 amendments was "to improve protections for vehicle purchasers under the existing lemon law"; to "eliminate inequities" to buyers; to promote the "fair" and "speedy" resolution of buyer complaints; to "*give adequate direction on the refunds* that consumers should be given when they are sold automobiles so defective that they cannot be repaired after a reasonable number of attempts"; and to establish "a *reasonable method* for fairly compensating 'lemon' car owners." (4MJN/924, 996-997, 1104-1105; 5MJN/1429, italics added.)

Thus, the Legislature "revise[d] the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, *as specified*," and went to great lengths to "[s]pecify *what would be included* in the replacement and refund option." (4MJN/894, 996, 998; 8MJN/2179, italics added.) The Legislature did so by splitting section 1793.2, subdivision (d), into two subdivisions:

- Subdivision (d)(1) covers all products other than new motor vehicles and merely repeats the Act's original open-ended language about replacing goods or reimbursing buyers. (See § 1793.2, subd. (d)(1); 3MJN/833; 4MJN/910.)
- Subdivision (d)(2) (hereinafter, "section 1793.2(d)(2)") covers manufacturers of new motor vehicles only, and subjects them to comprehensive, specific, formulaic

replacement/reimbursement requirements. (See § 1793.2(d)(2); 3MJN/833; 4MJN/894, 910-913.)

The new subdivision (d)(2) for lemon vehicles, which remains in place today, made the following pro-consumer changes:

- ***The prompt replacement/restitution standard***. If the manufacturer is unable to repair the vehicle to conform to the warranty "after a reasonable number of attempts," the manufacturer "*shall* either *promptly* replace the new motor vehicle in accordance with subparagraph (A) or *promptly* make restitution to the buyer *in accordance with subparagraph (B).*" (§ 1793.2(d)(2), italics added; 4MJN/910.)

- ***The statutory restitution standard.*** Instead of the prior, vague requirements to "reimburse the buyer in an amount equal to the purchase price," the Act now specifies (in subparagraph (B)) that "the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees . . . ." (§ 1793.2(d)(2)(B); see 4MJN/911 [the 1987 version said "sales tax" but was later changed to "sales or use tax"].) The restitution standard further provides that the buyer can recover "any incidental damages to which the buyer is entitled under Section 1794, including, but not

limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer." (*Ibid.*; see 4MJN/910-911.)

- ***The mileage-based offset for pre-repair use***.

Instead of the prior, vague requirement for an offset "directly attributable to use by the buyer prior to discovery of the defect" (1MJN/30), the Legislature added a specific "formula" (5MJN/1401-1402): "When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer *prior to the time the buyer first delivered the vehicle* to the manufacturer or distributor, or its authorized service and repair facility *for correction of the problem* that gave rise to the nonconformity"; and that amount must be determined by using a specific mathematical mileage-based formula (the "pre-repair offset") that divides the vehicle mileage at the first repair by 120,000 and multiplies that result by the price of the vehicle. (§ 1793.2(d)(2)(C), italics added; 4MJN/911.)

- ***Manufacturers cannot compel replacement***.

Recognizing that buyers might not want the same car model after being stuck with a lemon, the Legislature specified that buyers are "free to elect restitution in lieu of replacement." (§ 1793.2(d)(2); 4MJN/998; 5MJN/1400-1402.) The Legislature did not require buyers to return vehicles to the manufacturer to obtain relief. (See § 1793.2(d)(2); *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 194 (*Martinez*).)

- ***No other offsets***. The Legislature did not provide manufacturers with any offset for the vehicle's value if the vehicle was traded in, or if it was repossessed by a lienholder, or if the vehicle was totaled in an accident and insurance proceeds were received. Nor did the Legislature provide for any other offset or deduction other than the pre-repair offset and the deduction for nonmanufacturer items. (See § 1793.2(d)(2); *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1243 (*Jiagbogu*).) The pre-repair offset provision makes clear that the offset is of limited scope: "Nothing in this paragraph shall in any way limit the rights or remedies available to *the buyer* under any other law." (§ 1793.2(d)(2)(C), italics added.) Moreover, for the benefit of consumers the Act's provisions "are *cumulative* and shall not be construed as restricting any remedy that is otherwise available." (§ 1790.4, italics added.)

In addition to the new pro-consumer provisions in section 1793.2(d)(2) for lemon vehicles, the 1987 amendments and this appeal also involve the following statutes:

- ***Section 1794's general damages provision***. The sweeping 1987 amendments to section 1793.2(d) necessitated changing section 1794, the Act's general damages provision for all products. At the time, that provision stated that the measure of a buyer's damages depended on certain Commercial Code provisions. (See 3MJN/846.) Given the new comprehensive statutory replacement/restitution standard for lemon vehicles, the Legislature changed section 1794 to state that the "measure of the buyer's damages" under the Act "shall include *the rights of*

replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following," and then listed the Commercial Code provisions as subparagraphs. (§ 1794, subd. (b), italics added; 4MJN/901, 914.)[4]

- ***The branding/notification provisions***. The 1987 amendments also added a requirement that no person may subsequently sell or lease a vehicle that had been surrendered to a manufacturer pursuant to section 1793.2(d)(2) unless the original nonconformity "is corrected" and "clearly and conspicuously disclosed" and the manufacturer provides a one-year warranty. (4MJN/913-914, 999.)[5]

Almost a decade later, to combat manufacturers' efforts to evade the disclosure obligations, the Legislature enacted section 1793.23, which requires manufacturers re-acquiring vehicles under 1793.2(d)(2) to brand them as "Lemon Law Buybacks," and imposes additional notification requirements to prospective buyers or lessees. (See 8MJN/2180–9MJN/2604.)

- ***The civil penalty provision for willful misconduct***. The 1987 amendments preserved the Act's civil penalty provision for willful misconduct, which remains the same today: If the buyer establishes that the manufacturer's "failure

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[4] For brevity, we refer to the California Commercial Code as the "UCC," even though it technically is distinct from the Uniform Commercial Code

[5] This provision was originally codified at section 1793.2 (4MJN/913-914), but later moved to section 1793.22, subdivision (f)(1).

to comply was willful," the judgment may include "a civil penalty which shall not exceed two times the amount of actual damages." (§ 1794, subd. (c); see 3MJN/846; 4MJN/914.)

* * *

As these provisions confirm, and as this Court has recently recognized, the Act places the onus *entirely* on manufacturers to promptly repair, replace, buy back and/or brand lemon vehicles: "The Act imposes several *affirmative obligations* on manufacturers in addition to the requirement that they comply with their own warranties. These obligations include maintaining 'sufficient service and repair facilities' (§ 1793.2, subd. (a)(1)(A)); commencing repairs 'within a reasonable time' (§ 1793.2, subd. (b)); completing repairs 'within 30 days' (*ibid.*); and 'promptly' replacing or providing restitution for those vehicles the manufacturer cannot repair after a reasonable number of attempts. . . ." (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 984, italics added, citations omitted (*Kirzhner*).)

The Legislature fashioned the statutory remedy so that a manufacturer's affirmative obligation to buy back the vehicle arises as soon as reasonable attempts to fix the car fail. (See *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302-303 (*Krotin*).) Buyers do not need to request replacement or restitution to trigger the manufacturer's buy-back obligation. Rather, a buyer's *only* obligation to obtain the statutory relief is to present the vehicle for repair. (See *ibid.*; *Martinez*, *supra*, 193 Cal.App.4th at p. 194.)

B. Factual Background.

1. Niedermeier purchases a new Jeep for $40,000, which Chrysler supposedly warrants against defects.

Lisa Niedermeier is a mother of four. (2RT/907.) In January 2011, she purchased a Jeep from Chrysler for approximately $40,000, which was "a significant investment" for her family. (2RT/904-909, 915.) She chose the Jeep because Chrysler advertised and warranted the vehicle as "reliable and safe" and that its engine, transmission and powertrain components would operate properly for at least five years and 100,000 miles. (2RT/904-909, 1040-1041.)

2. Starting just a month after the purchase and continuing for four years, Niedermeier brings the Jeep to Chrysler sixteen times for repairs but Chrysler cannot repair it.

Only one month after purchasing the Jeep, Niedermeier had to bring the vehicle in for repairs. (2RT/910-911.) This would be the first of *sixteen* times in four years she sought warranted repairs; the repairs would cost over $13,000 and put the Jeep out of commission for 75 days. (3RT/1510.)

The Jeep suffered from three separate, recurring systemic failures—the transmission, the engine, and the exhaust—any combination of which rendered the vehicle a lemon; indeed, these problems were extraordinary even among lemons. (3RT/1253-

1254.) Without warning, the Jeep would jerk violently, make loud rattling noises, emit noxious gases, and heat up so much that Niedermeier could not set her feet on the floorboard. (2RT/911-912, 917-918, 922-923, 926-927; 3RT/1259-1260.) The Jeep struggled to perform even the most basic tasks—such as braking, accelerating, or turning through intersections. (2RT/912-913, 917-918, 947, 1086.)

These failures posed a "significant" safety hazard to Niedermeier and any passengers and drivers nearby. (3RT/1258.) An expert explained, for instance, that the noxious gases the Jeep emitted "can get into the passenger cabin and actually cause death ultimately." (3RT/1259.) And on multiple occasions, the Jeep's problems forced Niedermeier to pull over on the freeway because of safety concerns, including a time when the Jeep suddenly could not exceed 20-30 miles per hour while she was accelerating on a freeway onramp. (2RT/911-913, 922-923.)

Despite sixteen opportunities, Chrysler's authorized dealers could never fix the Jeep, even after replacing the engine after 70,000 miles and twice rebuilding the transmission. (3RT/1204-1253, 1510-1511.)

3. Chrysler repeatedly denies Niedermeier's requests for statutorily-required replacement or restitution relief.

Niedermeier asked Chrysler on three separate occasions to buy back the vehicle. (2RT/935-947; 3RT/1569-1575.)

Chrysler repeatedly refused, even though it knew about its dealers' failed attempts to fix the Jeep—having processed and paid their claims for warranted repairs. (*Ibid.*; 2RT/1048-1050; 3RT/1221-1223.) Instead, Chrysler offered Niedermeier $500 to go away, and when she persisted, offered $2,000—the amount she incurred for rental car expenses for the 75 days her Jeep was out of service. (2RT/936-938, 941; 3RT/1510, 1570-1571.)

After offering Chrysler three opportunities to avoid a lawsuit by buying back the Jeep, Niedermeier sued. (AA/7-41.)

4. Chrysler's refusals to buy back the Jeep force Niedermeier to sue and to trade in the Jeep to purchase a safe car.

Even after being sued, Chrysler still did not buy back the Jeep, leaving Niedermeier with an unsafe, unmerchantable vehicle that made her and her husband nervous every time she drove on the freeway. (2RT/947-948.)

Niedermeier tried selling the Jeep, but no one would buy it given its defects. (2RT/948-949.)

Finally, in dire need of a safe and functioning car, she traded in the Jeep to purchase a Yukon from a GMC dealership. (2RT/947-949, 951.) This ensured that while trying to hold Chrysler accountable under the Act, she would not have to drive a car that posed a danger to herself and others. (*Ibid.*)

Niedermeier purchased the Yukon for the inflated price of $80,000, which the dealer "reduced" to $61,000 by giving a

$19,000 trade-in "credit" on the Jeep. (See 2RT/949, 954, 956-958.)[6] Not only was the Jeep already a lemon and unsellable at market prices when Niedermeier traded it in, it was saddled with $8,900 in debt, and had already cost Chrysler over $13,000 in repairs. (2RT/942, 957, 993-994; 3RT/1251-1257, 1510.)

No evidence was presented that a debt-ridden Jeep that had broken down repeatedly over four years was actually worth $19,000 or that the "credit" from GMC actually reduced the price of the Yukon. That is no surprise: dealers often inflate trade-in credits along with a car's purchase price to make it look like they are providing a large discount when they are not. (See 3RT/1525 [expert describing the numbers as "kind of fuzzy, if you know the way dealership sales work"]; 9MJN/2606 [Department of Consumer Affairs explaining that "the new vehicle's purchase price [and] the value of the trade-in" are "not 'hard' numbers even though they appear to be after the fact"].) In fact, Chrysler admitted that the Jeep would only have been worth "something like $12,000 or $13,000" at full bluebook value at the time it was traded in—that is, if the Jeep had been fully functioning (i.e., not a lemon) and debt-free, which it wasn't. (2RT/953.)[7]

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[6] The retail price for a 2021 Yukon is as low as $50,700—i.e., less than what Niedermeier paid for the Yukon *even after* accounting for the trade-in. (See https://www.edmunds.com/gmc/yukon/ [as of May 27, 2021].)

[7] Although the jury in this lawsuit heard evidence that Niedermeier received a $19,000 trade-in credit (2RT/957), the trial did not address whether that amount reflected true value. When Chrysler requested a trade-in offset *after* trial, Niedermeier opposed the offset but alternatively requested an

C. This Lawsuit.

1. Niedermeier sues Chrysler for Song-Beverly Act violations.

Niedermeier sued Chrysler under the Act for breach of express and implied warranties. (AA/8-37.) She alleged that Chrysler was unable to conform the vehicle to its warranty after numerous repair attempts and that Chrysler "failed to either promptly replace the new motor vehicle or promptly make restitution in accordance with the [Act]." (AA/32.) She sought reimbursement of the purchase price, incidental and consequential damages, and a civil penalty of up to two times her actual damages because Chrysler "willfully failed to comply with its responsibilities under the Act." (AA/32-33.)

Although Chrysler later conceded to a jury that it was "not proud" of Niedermeier's Jeep and that the vehicle was not "defect-free" (1RT/723, 725; 4RT/1903), it still aggressively defended the lawsuit all the way to jury verdict. It asserted twenty-three affirmative defenses that included accusing Niedermeier of "bad faith" and "unclean hands," arguing she should recover nothing. (AA/60-66.) Chrysler claimed it did not violate the Act and suggested, without any proof, that Niedermeier caused the car's problems by spilling coffee,

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evidentiary hearing on the Jeep's actual value. (See 5RT/2414 ["it's going to be worth, like, nothing"].) No such hearing occurred because the trial court denied the offset. (See p. 28 *post*.) Chrysler has never claimed the $19,000 trade-in credit reflects true value; it has simply argued the credit is binding.

providing insufficient maintenance, or using big tires. (1RT/721-723; 4RT/1873-1874, 1888-1898, 1904-1907, 1911.) Chrysler even told the jury the lawsuit was a sham, accusing Niedermeier and her counsel of "want[ing] to get something for nothing to take advantage of a situation in which this car has multiple service calls" and "try[ing] to get . . . civil penalties." (4RT/1870; see also 4RT/1903 [Chrysler: "We are here because this case is lawyer-driven, trying to get something for nothing"].)

2. A jury awards Niedermeier the statutory restitution remedy and consequential damages, plus a civil penalty for Chrysler willfully violating its buy-back obligation.

The jury rejected all of Chrysler's arguments and found in Niedermeier's favor on her claims under the Act for breach of express and implied warranties, recognizing that Chrysler had failed to repair her vehicle and then failed to promptly replace or repurchase it. (AA/129-133.) The jury awarded $39,584.43 in damages on the express warranty claim, based on $39,799 for the "purchase price of the vehicle," $5,000 in incidental and consequential damages, and a $5,214.57 mileage-based deduction based on the statutory pre-repair offset. (AA/130-131.)

The jury also found that Chrysler *willfully* failed "to repurchase or replace" the vehicle, meaning Chrysler "knew what it was doing and intended to do it" and did not act "in good faith." (AA/131; 4RT/1834, 1848-1849.) Based on Chrysler's willful

misconduct, the jury awarded Niedermeier $59,376.65 in civil penalties under section 1794. (AA/132.)

3. The trial court rejects Chrysler's request for an offset for the Jeep's trade-in credit.

In post-trial and post-judgment motions, Chrysler argued that it was entitled to a $19,000 offset for the Jeep's trade-in credit. (AA/82-86, 147-181, 432-436.)

The trial court rejected the requests, concluding such an offset was contrary to the Act's plain language and would undermine a manufacturer's incentive to comply with the Act by rewarding delayed compliance. (See AA/123-127; AA/435.)

D. The Court Of Appeal's Decision.

Chrysler appealed on the grounds that the award should be reduced by the amount of the trade-in credit. (Opn. 5-6, 17.)

The Court of Appeal agreed, holding that the "'amount equal to the actual price paid or payable'" by the buyer under the Act "does not include amounts a plaintiff has already recovered by trading in the vehicle at issue." (Opn 2.) The court reasoned that the Legislature's choice of the word "restitution" intended to adopt a "common-law gloss" on its remedies which would "'restore "the *status quo ante* as far as is practicable."'" (Opn. 18, 23.) Based on this theory, the court deducted the amount of the trade-in credit, thereby effectively rewarding Chrysler for its unlawful refusal to buy back Niedermeier's car.

In so ruling, the Court of Appeal acknowledged "that prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance." (Opn. 24, citing *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244.) But the court dismissed such concerns, concluding they are "outweighed by the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing buyers to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles." (Opn. 24.) Based on this policy rationale, the court read the Act as *impliedly* allowing a trade-in offset beyond the Act's express offsets.

The Court of Appeal stopped short of determining "whether the civil penalty cap . . . should be calculated before or after reducing plaintiff's damages to account for a trade-in or resale." (Opn. 28, fn. 8.) Instead, based on its erroneous view that Niedermeier had *conceded* that the civil penalty should be calculated *after* applying the offset, the court deducted the offset from Niedermeier's damages and then re-calculated the civil penalty. (Opn. 27-28.) As a result, the Court of Appeal reduced the $98,961.08 judgment to $61,753.29, "reflecting damages of $20,584.413 and a civil penalty of $41,186.86." (Opn. 29.)

E. The Rehearing Denial.

Niedermeier petitioned for rehearing or, alternatively, partial depublication, on the ground that the opinion erroneously indicated she had conceded the civil penalty should be reduced by any trade-in offset. (See Petition For Rehearing Or, Alternatively, Partial Depublication, filed 11/16/2020 in B293960

["Reh'g Pet."].) Niedermeier explained that she "did not concede that a trade-in or resale credit should be subtracted from the base 'actual damages' amount for calculating the cap on civil penalties. [She] has consistently maintained that if a trade-in credit exists at all, it must be taken at the *end*—i.e., against the *total judgment*." (Reh'g Pet. 4, original italics; see also *id.* at p. 10, quoting Niedermeier's oral argument ["[E]ven if you were to take a [trade-in] offset, you take it at the very end"].)

Niedermeier asked the Court of Appeal to either decide the issue or depublish that portion of the opinion. The court denied both requests. (11/20/2020 Order.) This appeal followed.

STANDARD OF REVIEW

This Court determines de novo the meaning of the Act's statutes. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972; *Murillo*, *supra*, 17 Cal.4th at p. 990.)

LEGAL DISCUSSION

I. The Song-Beverly Act Does Not Permit An Offset For A Dealer's Trade-In Credit.

In construing the Act, this Court "'first examine[s] the statutory language, giving it a plain and commonsense meaning.'" (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.) It does not consider the language "in isolation" but instead examines "the entire statute to construe the words in context." (*Ibid.*) "If the language is unambiguous, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" (*Ibid.*) The Court must "keep in mind that the Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." (*Ibid.*, internal quotation marks omitted.) "[C]ourts should liberally construe remedial statutes in favor of their protective purpose." (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 532.)

We show below that the Act's plain language unambiguously does *not* permit an offset for a trade-in credit. (See § A, *post*.) Chrysler's offset request should therefore fail.

But the answer should not change even if this Court were to find the language ambiguous: "'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'" (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.) Any consideration of such aids confirms that the Legislature

meant what the plain language says: No trade-in offset. (See § B, *post*.)

A. The Act's plain language unambiguously does not permit a trade-in offset.

1. Section 1793.2(d)(2) sets forth a *statutory*, not common law, restitution standard.

The Act's plain language is clear: Section 1793.2(d)(2) sets forth a *statutory*, not common law, restitution standard for lemon vehicles. Manufacturers must "promptly make restitution to the buyer in *accordance with subparagraph (B)*." (§ 1793.2(d)(2), italics added.) The Act does not reference a common-law definition of "restitution." The word "restitution" never appears by itself in the Act's provisions for lemon vehicles. That word is *always* expressly linked to the specific *statutory* standard set forth in section 1793.2(d)(2).[8]

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[8] See §§ 1793.22, subd. (d)(5) (manufacturer must "make restitution in accordance with paragraph (2) of subdivision (d) of Section 1793.2"), 1793.23, subd. (c) (referring to vehicle "accepted for restitution . . . pursuant to paragraph (2) of subdivision (d) of Section 1793.2"), 1793.25, subd. (a) (referring to "restitution to the buyer or lessee pursuant to subparagraph (B) of paragraph (2) of subdivision (d) of Section 1793.2"). Further, the Act's general damages provision does not even use the term "restitution"; it uses the term "reimbursement" and—consistent with the entire Act—limits that remedy to section 1793.2(d)'s express standards: "The measure of the buyer's damages in an action under this section shall include the rights of replacement *or reimbursement* as set forth *in subdivision (d) of Section 1793.2* . . . ." (§ 1794, subd. (b), italics added.)

Under the Act's statutory standard, "restitution" means the "amount equal to the actual price paid or payable by the buyer" (§ 1793.2(d)(2)(B)), subject to only two statutorily-defined offsets:

- for "nonmanufacturer items installed by a dealer or the buyer" (§ 1793.2(d)(2)(B)); and
- for the buyer's use of the vehicle before it was first brought for repairs, calculated by a specific formula based on the purchase price and the mileage before the vehicle was first delivered for repairs. (§ 1793.2(d)(2)(C)).

These are the *only* permitted reductions from the restitution remedy mandated by the Act. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 666-667 [*expressio unius est exclusio alterius* dictates that when legislature manifests its intent to include specific matters, it intended to *exclude* other matters]; *Murillo*, *supra*, 17 Cal.4th at p. 991 [inclusion of the one means the exclusion of another].)

As one court explained: "Section 1793.2, subdivision (d)(2)(C), and (d)(2)(A) and (B) to which it refers, comprehensively address replacement and restitution; specified predelivery offset; sales and use taxes; license, registration, or other fees; repair, towing, and rental costs; and other incidental damages. None contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs

indicates legislative intent to exclude such offsets." (*Jiagbogu, supra,* 118 Cal.App.4th at pp. 1243-1244.)

On their face, the only permitted deductions both pertain to the period *before* the vehicle was first delivered for repair. Under the Act's plain language, there are *no* reductions for anything occurring *after* the manufacturer's buyback obligation arises, such as for the buyer's continuing use of the vehicle or the buyer's disposal of the vehicle through repossession or trade-in.

This scheme makes sense. Limiting manufacturers to only pre-repair offsets "creates an incentive for the buyer to deliver a car for repairs soon after a nonconformity is discovered" (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244), while at the same time creating an incentive for manufacturers to *promptly* buy-back lemons upon discovering that they cannot repair the nonconformity, as the Act expressly mandates. The absence of any other offset also comports with the fact that lemon vehicles are, by definition, unfixable and have no real value. (See § 1793.22, subd. (e)(1) [for § 1793.2(d) purposes, a nonconformity "substantially impairs the use, value, or safety" of the vehicle]).

Instead of applying the Act's plain language, the Court of Appeal imported *common law* concepts of recission and restitution into its reading of section 1793.2(d)(2). (Opn. 18, 23.)

This was error. Restitution under the Act is a purely *statutory* creature, and is measured in a specific way. It is not common-law restitution. Reading the Act as implicitly allowing

an additional offset for trade-in value violates the Act's plain language.

The Court of Appeal's approach also offends the Act's core purpose: "'to give *broader* protection to consumers than the common law or [UCC] provide,'" not to mirror them. (*Martinez*, *supra*, 193 Cal.App.4th at p. 198, italics added, quoting *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241.) Under the Act's express terms, buyers cannot waive their rights to the statutory standard set forth in section 1793.2 (§ 1790.1), and those statutory rights prevail to the extent they conflict with the UCC (§ 1790.3). Defenses traditionally available to manufacturers in warranty litigation brought under the common law or the UCC "have been abrogated or minimized" in actions brought under the Act. (Judge Ronald F. Frank, *Lemon Law* (2016) 39-NOV L.A. Law. 27, citing *Krotin, Jiagbogu, Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1263; *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1307-1309; *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 890-891; *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1053 *(Lukather*).)

Thus, the Legislature designed the Act to afford consumers *greater* protection than would have been available under the common law or the UCC. The Court of Appeal's approach undermines that basic design.

2. The Court of Appeal impermissibly re-wrote the statute to reflect unexpressed, supposed intent.

This Court has long recognized that it "'has no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed.'" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365.) It therefore must be presumed that had the Legislature intended to give manufacturers an offset for trade-in credits, it would have said so *expressly*. As *Jiagbogu* recognized in rejecting a manufacturer's attempt to imply an unenumerated offset into section 1793.2(d)(2), the "omission of other offsets from a set of provisions that thoroughly cover other relevant costs *indicates legislative intent to exclude such offsets*." (118 Cal.App.4th at pp. 1243-1244, italics added, citing *Gikas v. Zolin* (1993) 6 Cal.4th 841, 853.)

Had the Legislature intended for section 1793.2(d), which is a "more protective statute" than the common law, "to be limited by traditional doctrines, or the remedies provided in section 1793.2, subdivision (d) to be treated as recission under common law, it surely would have used language to that effect." (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241; accord *Martinez*, *supra*, 193 Cal.App.4th at p. 194 [stating that the Act "says nothing" about buyers having to retain vehicles after manufacturers breach their statutory obligations and noting "[i]f

the Legislature intended to impose such a requirement, it could have easily included language to that effect"].)

That the Legislature chose *not* to use such language should be dispositive. (*See Martinez*, *supra*, 193 Cal.App.4th at p. 199 [rejecting manufacturer's attempt "to insert common law and/or (UCC) provisions into the Act"]; *Jiagbogu*, *supra*, 118 Cal.App.4th at pp. 1241-1242 [rejecting manufacturer's request for an unenumerated common-law offset for plaintiff's use of his car after his buyback request].)

The Court of Appeal justified its newly minted trade-in offset by reasoning that it was not an offset at all, just part of the calculation of restitution under the Act. (Opn. 26.) But as this Court has previously held, an exception as to how a statute ordinarily operates *is* an offset. (See *Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731-733 [tax board's attempt to reduce taxpayer's damages based on unpaid taxes was an offset, not a question over the proper measure of damages].) The Court of Appeal's conclusion to the contrary was plain error.

3. Until the Court of Appeal's decision here, courts had uniformly applied section 1793.2(d)(2)'s plain language to reject manufacturer requests for unenumerated offsets/reductions.

This isn't the first case where a vehicle manufacturer sought to reduce its payment obligations under section 1793.2(d)(2) based on an unenumerated offset. But this is the

first to uphold such an attempt. Every other court to consider this tactic, including the trial court here, has rejected those attempts as contrary to the Act's plain language.

In *Jiagbogu,* a manufacturer relied on offsets generally allowed under common law rescission/restitution principles to argue that the plaintiff's use of the vehicle *after* he made a buyback request entitled the manufacturer to an offset against the jury's damages award. (118 Cal.App.4th at pp. 1239-1240.) *Jiagbogu* disallowed the requested offset, reasoning that the Act "comprehensively" addresses the statutory "replacement and restitution" remedies, spells out the consumer's "incidental damages," and provides a "predelivery offset"—yet lacks "any language authorizing an offset in any [other] situation." (*Id.* at pp. 1243-1244.)

The Court of Appeal here attempted to distinguish *Jiagbogu* on the basis that there, "rulings in the manufacturer['s] favor would have deprived the plaintiffs of the full purchase price of their vehicles . . . by reducing the refund to reflect use of the vehicle after the buyer requested restitution." (Opn. 20.) The Court of Appeal concluded that this "concern does not exist here, where plaintiff can recover the full purchase price through a combination of the trade-in and restitution from defendant." (Opn. 21.) But that reasoning ignores that the Legislature *did* provide for an offset that deprives plaintiffs of the full purchase price but chose to limit that offset to the vehicle's use before its delivery for repair. The Court of Appeal's holding is irreconcilable with *Jiagbogu* and with the Act's plain language,

which simply does not allow for manufacturer offsets other than those expressly stated. (118 Cal.App.4th at pp. 1243-1244.)

Lukather likewise rejected a manufacturer's attempt to imply unenumerated offsets into section 1793.2(d)(2). (*See* 181 Cal.App.4th 1041 at pp. 1052-1053.) There, the manufacturer sought "an offset for [plaintiff's] use of a rental car" during litigation, arguing that plaintiff should have mitigated the manufacturer's damages by accepting the manufacturer's belated offer to purchase the defective car instead of incurring an additional $21,000 in rental car expenses. (*Ibid.*) *Lukather*, like *Jiagbogu*, rejected the offset as contrary to section 1793.2(d)(2)'s plain language. It followed *Jiagbogu*'s reasoning that the statute's comprehensive terms contain no authorization for any offset other than for the plaintiff's use of the vehicle before delivering it for repair. (*Id.* at p. 1052.)

Similarly, in *Robbins v. Hyundai Motor America* (C.D. Cal., Aug. 7, 2014, No. 8:14-cv-5-JLS) 2014 WL 4723505, the court rejected a manufacturer's attempt to "condition its offer to repurchase [plaintiff's] vehicle on a deduction for excess wear and tear." (*Id.* at *7.) There again, the court rejected the offset based on the Act's plain language: "[I]f an amount is part of the price 'paid or payable,' but not an 'amount directly attributable to use by the buyer,' then the manufacturer *must pay* that amount." (*Id.* at *7, fn. 11, italics added.) And if an amount is directly attributable to use by the buyer, recovery is limited to use before the buyer first delivered the vehicle and "may only be accounted for using [the statutory] mileage deduction. (*Id.* at *7.)

In short, the Court of Appeal's adoption here of an implied trade-in offset stands alone. No other court has disregarded section 1793.2(d)(2)'s plain language by injecting common-law principles into the comprehensive, *statutory* standard.

Because the Act is strongly pro-consumer, it must be liberally construed to protect plaintiffs like Niedermeier. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972; *Murillo*, *supra*, 17 Cal.4th at p. 990.) That means: No trade-in offset.

4. The Court of Appeal's reliance on *Mitchell* was misplaced.

The Court of Appeal based its decision to adopt a trade-in offset on a single case that does not actually support it: *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32 (*Mitchell*). (See Opn. 18.)

The court interpreted *Mitchell* as construing the term "restitution" in section 1793.2(d)(2) "to mean that the Legislature intended that remedy 'to restore "the *status quo ante* as far as practicable"'"—in other words, to place the buyer in the position he or she would have been in had he or she not purchased the defective vehicle." (Opn. 18.) The court concluded that, "[r]elying on this principle, the *Mitchell* court interpreted 1793.2, subdivision (d)(2) to permit the recovery of costs *beyond* those expressly listed there, in that case the interest payments on the vehicle loan, in order to make the plaintiff whole." (*Ibid.,* italics added.) From this, it held: "Just as the *Mitchell* court concluded that 'restitution' under the Act cannot leave a plaintiff in a worse

position than when he or she purchased the vehicle, it similarly would be inimical to the concept of restitution to leave a plaintiff in a better position, rather than merely restoring her to the *status quo ante*." (*Ibid.*)

For multiple reasons, the Court of Appeal's reliance on *Mitchell* was misplaced.

First, *Mitchell* simply held that buyers are entitled under 1793.2(d)(2)(B)'s *express* language "to recover paid finance charges as part of the 'actual price paid *or payable*.'" (80 Cal.App.4th at p. 36, italics added.) *Mitchell* did *not* examine whether courts can *imply* unenumerated manufacturer offsets into section 1793.2(d)(2)'s plain language. *Mitchell* therefore did not reach the question presented here. And "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268.) *Mitchell*'s plain-meaning analysis of express terms is worlds apart from implying a trade-in offset that appears nowhere in the statute.[9]

[9] Permitting recovery of finance charges as in *Mitchell* tracks the Act's *express* language because consumers are entitled to recover not just what they paid but also the amount "payable"—e.g., the loan on the vehicle for which the consumer becomes indebted. *Mitchell* emphasized an out-of-state case which recognized that a buyer purchasing a car "'incurred at the point of sale an obligation to pay the finance charges directly attributable to the purchase of the vehicle.'" (80 Cal.App.4th at p. 39.) *Mitchell* held that, "as in [that out-of-state case], the phrase 'actual price paid or payable,' includes all amounts plaintiffs *became legally obligated to pay when they agreed to buy the [vehicle],* which included the finance charges." (*Ibid.*, italics added.)

Second, the portion of *Mitchell* that the Court of Appeal emphasized—the decision's reference to the word "restitution"—did not rely on Song-Beverly authority. Instead, *Mitchell* cited (1) *Alder v. Drudis* (1947) 30 Cal.2d 372, 384 (*Alder*) for the proposition that "restitution" is intended to restore the *status quo ante*; and (2) an appellate decision which acknowledged that aggrieved parties in recission actions are entitled to restitution of benefits. (80 Cal.App.4th at p. 36.) Both cases, however, are *pre-lemon-law* cases discussing the common law. And *Mitchell* pre-dates the detailed explanation in *Jiagbogu* and *Martinez* that section 1793.2(d)(2) is a statutory remedy that does *not* incorporate unstated common law principles.

Third, the Court of Appeal erred in construing *Mitchell*'s passing *status quo ante* reference as indicating the Legislature intended to "place the buyer in the position he or she would have been in had he or she not purchased the defective vehicle." (Opn. 18.) That's not what section 1793.2(d)(2)(B) does. Returning the parties to the *status quo ante* is not the Act's goal. The Act does not require the buyer to return the vehicle to the manufacturer. (See *Martinez*, *supra*, 193 Cal.App.4th at p. 194.) Nor does the buyer get the full purchase price as though she had "not purchased the defective vehicle" (Opn. 18)—instead, after excluding "nonmanufacturer items installed by a dealer or the buyer" from the price paid or payable, the manufacturer gets a specific mileage-based offset for the buyer's use of the vehicle before being presented for repair (§ 1793.2(d)(2)(B), (C).) Contrary to the Court of Appeal's view, the statutory remedy is

neither a straight *status quo ante* remedy nor a straight restitution/recission remedy. It is a *sui generis* creation of the Legislature designed to make manufacturers provide prompt specified remedies to consumers.

Fourth, in relying on *Mitchell*'s reference to "restitution," the Court of Appeal ignored that in a traditional sense "restitution" to a vehicle buyer would simply mean restoring to the buyer *the benefit* that the buyer *conferred to the manufacturer*—that is, the full purchase price. (See, e.g., *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 ["An individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is enriched if the person receives a benefit at another's expense."], internal citations omitted.) In trying to shoehorn a "credit" or "payment" from a *third-party* transaction into "restitution," Chrysler erroneously conflates restitution with mitigation of damages. That is a separate concept—one that was not at issue in *Mitchell* and that does not apply to section 1793.2(d)(2). (*Lukather*, *supra*, 181 Cal.App.4th at pp. 1052-1053.)

Fifth, the Court of Appeal failed to understand that *Mitchell* merely considered the word "restitution" in supporting its plain-meaning analysis of "actual price paid or payable." *Mitchell* did not hold or even suggest that use of the word "restitution" means that the Legislature intended to incorporate into the statute *sub silentio* common law principles that would give manufacturers unenumerated deductions. Instead, *Mitchell* emphasized that the Act "is remedial legislation intended *to*

protect consumers and should be interpreted to implement its beneficial provisions." (80 Cal.App.4th at p. 36, italics added.) And *Mitchell* based its holding on the Act's plain language, concluding that "the Legislature intended to allow a buyer to recover the *entire amount* actually expended for a new motor vehicle, including paid finance charges, less any of the expenses *expressly excluded* by the statute." (*Id.* at p. 37, italics added.)

In short, *Mitchell*'s consumer-friendly, plain-meaning analysis does not support unenumerated offsets. It supports strictly applying the Act's literal language.

The *Martinez* court recognized as much. The manufacturer in *Martinez* cited *Mitchell* and *Alder* as supporting its attempt to change its statutory payment obligation by injecting unenumerated restitution/recission principles into section 1793.2(d)(2). In rejecting that attempt, *Martinez* explained: "Defendant's reliance on *Mitchell*'s discussion is not only misplaced, but is not contextual. . . . *Mitchell* has no application to the issues in this case and *Alder* predates the Act by 23 years and applies common law rules of equity. As the *Jiagbogu* court stated, 'principles of equity [cannot] be used to avoid a statutory mandate.'" (*Martinez*, *supra*, 193 Cal.App.4th at p. 199.)

The same is equally true here. The plain language governs, and it compels one conclusion: No trade-in offset.

B. Although the Act's unambiguous language renders other interpretive aids irrelevant, such aids still show that the Legislature meant what it said: No offset.

Courts may consider other interpretive aids, such as a statute's purpose, public policy and legislative history, *only* when a statute is ambiguous. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972.)

Such aids are therefore irrelevant here. (See *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 133 (*Cassel*) [appellate court improperly created "a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern"; "We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them"].)

Even if this Court were to look beyond the Act's plain language, the end result should be the same: No trade-in offset.

1. Allowing a trade-in offset would undermine section 1793.2(d)(2)'s core purpose by vitiating manufacturers' incentives to promptly buy back lemons.

"Any interpretation that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided." (*Kwan v. Mercedes–Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 (*Kwan*).) Court must likewise avoid interpretations that would encourage a manufacturer's

"unforthright approach and stonewalling of fundamental warranty problems." (*Krotin*, *supra*, 38 Cal.App.4th at p. 303.)

Interpreting the Act as including a trade-in offset would do both: It would vitiate a manufacturer's incentive to comply with the Act's affirmative obligations and encourage stonewalling.

As this Court recognized, the Act imposes an "affirmative obligation" on manufacturers to "'*promptly*' repurchase or replace a defective vehicle it is unable to repair." (*Kirzhner*, *supra*, 9 Cal.5th at p. 971, italics added.) Thus, the Legislature structured the Act to trigger those affirmative obligations immediately after reasonable attempts to repair the vehicle have failed, even without the buyer requesting a buy-back; *at that point*, the seller must re-acquire and brand the lemon and either (at the buyer's election) replace the vehicle or pay the buyer the full price "paid or payable" minus the mileage offset. (*Ibid.*; *Krotin*, *supra*, 38 Cal.App.4th at pp. 302-303; *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1103 ["the only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable *opportunity* to repair the vehicle," original italics].)

Letting manufacturers claim an offset that would necessarily only arise *after* manufacturers have failed to promptly buy back vehicle would flip this statutory scheme on its head. It "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. Exclusion of such offsets furthers the Act's purpose." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1244; accord, *Lukather*, *supra*, 181 Cal.App.4th at p. 1053 ["the

imposition of a requirement that [plaintiff] mitigate his damages so as to avoid rental car expenses—after GM had a duty to respond promptly to [plaintiff's] demand for restitution—would reward GM for its delay"].)

Construing the Act as excluding a trade-in offset—in other words, construing the Act in accordance with its plain language—would further the statutory purpose of encouraging the prompt re-acquisition and branding of lemons. In contrast, allowing a trade-in offset would incentivize manufacturers *to delay* buying back lemons in the hopes of inducing a trade-in.

Manufacturers undoubtedly know their refusal to buy back a lemon makes a trade-in likely. Yet, their refusal to buy back a lemon leaves the buyer stuck with an unsafe, unreliable vehicle with continuing expenses, such as finance payments, insurance, and registration fees. So, as the trial court recognized, "[f]aced with owning a lemon for a vehicle, many consumers would reasonably do just what plaintiff did here—trade in the vehicle for a replacement vehicle." (AA/125; 3RT/1250 [expert notes Niedermeier's trade-in was unsurprising].) Indeed, the most defective vehicles—for example, ones with sixteen repair attempts—are the vehicles most likely to be traded-in for a safe vehicle, yet those are the ones by which a manufacturer would reap the best benefit for its delay.

If trade-in offsets were allowed, manufacturers would substantially benefit on multiple fronts whenever their refusal to buy back a lemon induced the frustrated buyer who was stuck with an unsafe car to trade in the lemon while waiting for relief.

Among other things:

- The out-of-pocket cost for buyers in purchasing the new safe vehicle would create inordinate pressure to reach a compromise that would let manufacturers avoid their full statutory payment obligations.

- If the buyer has the financial wherewithal to purchase a new, safe vehicle and avoid the pressure to compromise, the manufacturer still could reduce its restitution obligations by the trade-in amount—an inherently-inflated number given the vehicle's lemon status (since lemons, by definition, are unsafe vehicles lacking true market value). That credit would far exceed the vehicle's *de minimis* value to the manufacturer had the car been returned to the manufacturer instead of being traded in.

- The trade-in would let the manufacturer avoid the overhead expenses associated with re-acquiring and branding the vehicle as a lemon, making further repair attempts, and trying to auction the vehicle.

- The trade-in would eliminate the manufacturer's continuing liability and financial exposure for myriad potential damages, including the interest owed on any continuing debt, insurance and registration fees, the high cost of additional repairs and rental car fees, and damages for accidents resulting from the buyer driving an unsafe vehicle (including personal injuries to the buyer and other roadway users, and property damage). Allowing trade-in offsets would thus facilitate a

manufacturer's ability to fight tooth and nail, and to force buyers to take cases to trial to compel a manufacturer's compliance with statutory obligations that the manufacturer should have *affirmatively* provided *promptly*.

- Trade-in offsets also raise the specter of collusion between manufacturers and dealers, as both benefit when a dealer artificially inflates a trade-in value to sell a new car.

The Court of Appeal ignored all of these issues. (See Opn. 21-24.) It *deemed irrelevant* the inflated nature of trade-in credits for lemons: "The fact that the dealer may have inflated the price of the Yukon or the value of the trade-in is immaterial; what matters is what the plaintiff bargained for and received." (Opn. 27.) But the inflated nature of a trade-in credit is *highly* relevant because the resulting offset lets manufacturers reduce their statutory liability by far more than the defective vehicle's actual worth—thereby greatly incentivizing manufacturers to disregard their buy-back obligations under the Act.

This case proves the point: The GMC dealership "charged" Niedermeier the obviously inflated price of $80,000 for a Yukon, and then reduced that so-called price to $61,000 by giving an inherently-inflated $19,000 trade-in "credit" on the Jeep, an unsellable lemon saddled with $8,900 in debt. (See pp. 24-25, *ante*.)[10]

[10] The Department of Consumer Affairs has noted that a new vehicle's "purchase price" and "the value of the trade-in" are not "'hard' numbers, even though they appear to be after the fact." (See 9MJN/2606.) Instead, the amount of a trade-in credit varies

Manifestly, allowing trade-in offsets would allow manufacturers to *benefit* from violating their affirmative statutory obligation to promptly buy back lemon vehicles. Willful violators of the Act can hang back and try to get lowball settlements, then push a case to trial instead of buying back the vehicle, and then—if the buyer fights to the end—reduce any restitution award by an inflated trade-in credit. (Which is exactly what happened here.) Under this regime, the more egregious the vehicle's defects and repair history, the greater the potential benefit to the manufacturer in delaying with the hopes that the buyer will dispose of the unsafe vehicle, by trade-in or otherwise. This Court should not countenance such a perverse result.

Martinez acknowledged the flaw in such a regime when it examined the repossession of lemon vehicles. *Martinez* recognized that reasonable consumers would opt for repossession when faced with spending years in litigation while making finance payments on an unusable car—and that letting manufacturers make use of repossessions to avoid paying the full

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based on "factors that *are not related to [the used vehicle's] actual value*" and dealers can "adjust the purchase price to compensate for" the high value assigned to a trade-in. (9MJN/2606-2607, italics added.) This explanation should receive deference because the Department is entrusted with implementing the Act's requirements for alternative dispute resolution. (See 9MJN/2605, 2607; Bus. & Prof. Code, § 472.4; Civ. Code, § 1793.22, subd. (d); *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243-1244.)

purchase price "would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement" because "any delay increases the likelihood that the buyer will be forced to relinquish the car to a lienholder." (*Martinez, supra,* 193 Cal.App.4th at pp. 194-195.)

The same is true of a trade-in offset. As the trial court recognized here, a trade-in offset "appears, like in *Martinez*, to be inconsistent with the pro-consumer policy supporting the Act. [It] would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement; and any delay increases the likelihood that the buyer will be forced to sell the vehicle." (AA/125.)

The Court of Appeal distinguished *Martinez* on the grounds that allowing a trade-in offset would not bar a plaintiff from recovering the entire purchase price, just part of it, and that *Martinez*'s repossession holding did not "give plaintiff a windfall and incentivize future plaintiffs to seek that same windfall." (Opn. 21.) But that reasoning flips the proper focus on its head: It gives paramount importance to whether denying an offset to manufacturers might give *buyers* a windfall, instead of analyzing whether allowing the offset might "significantly vitiate a *manufacturer's* incentive to comply with the Act." (See *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1244, italics added.)

As a threshold matter, denial of a trade-in offset would not give Niedermeier a "windfall." An inherently-inflated $19,000 so-called trade-in "credit" is meaningless when applied to "reduce" an inherently-inflated $80,000 so-called "price." (See

pp. 24-25, *ante*.) And the trade-in only occurred because Chrysler's breach of its buyback obligation forced Niedermeier to have to trade in her lemon to obtain a safe vehicle. (Cf. *Kirzhner*, *supra*, Cal.5th at p. 982 [recognizing that "if the buyer could not use the vehicle due to the defects and was forced to acquire a substitute vehicle as cover, the buyer might be able to recover the additional registration fee incurred and paid on the substitute vehicle"].)

But even if rejecting a trade-in offset *would* give a windfall to Niedermeier, that would not matter because allowing the offset would give *manufacturers* a windfall—thereby encouraging them not to comply with the Act. Given the Act's "strongly pro-consumer" purpose (*Murillo*, *supra*, 17 Cal.4th at p. 990), any benefit of any doubt should fall on the side of the consumer, not the manufacturers who breached their affirmative obligations to promptly buy back and brand lemons (see *Kirzhner*, *supra*, 9 Cal.5th at p. 972 [holding that "the Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action"]; *People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269 ["to the extent [a remedial] statute is ambiguous," it still "is to be liberally construed to the end of fostering its objectives" and "wherever the meaning is doubtful, it must be so construed as to extend the remedy" to the protected plaintiff, internal quotation marks and citations omitted]).

As *Jiagbogu* summarized, the proper focus is whether giving the manufacturer an offset "would reward it for its delay

in replacing the car or refunding [the buyer's] money when it had complete control over the length of that delay, and an affirmative statutory duty to replace or refund promptly," not whether "without the [requested] offset, a buyer such as [plaintiff] would receive an unfair windfall." (118 Cal.App.4th at pp. 1243-1244.)

2. Because reading the Act's plain language as precluding a trade-in offset yields a reasonable result, there is no reason to second-guess the Legislature's policy determination.

Even assuming the Court of Appeal's concern about granting Niedermeier a "windfall" made sense as a policy consideration (it does not), it still would not matter. Courts have limited power to consider public policy when interpreting statutes. "'Crafting statutes to conform with policy considerations is a job for the Legislature, not the courts; [a court's] role is to interpret statutes, not to write them.'" (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2004) 117 Cal.App.4th 350, 362, citations omitted.)

Courts must consider the reasons that the Legislature "could" or "might" have had for the statute's plain terms. (See *Cassel, supra,* 51 Cal.4th at p. 136.) If a reasonable reason exists, the inquiry must stop and the court must apply the statute according to its literal terms, regardless of whether that language "ideally balances the competing concerns or represents the soundest public policy." (*Ibid.*)

A reasonable reason exists here. It is reasonable to believe that the Legislature, in order to protect buyers and encourage manufacturers to promptly buy-back and brand lemon vehicles, only intended the offsets that it *expressly* designated. As shown, reading the Act as allowing a trade-in offset would incentivize manufacturers to breach their affirmative statutory obligations to promptly buy-back and brand lemon vehicles, thus undermining the entire statutory scheme. In contrast, had Chrysler complied with its statutory obligations, it would have *affirmatively*:

- re-acquired Niedermeier's Jeep after the failed repair attempts or at a minimum after any of her multiple buy-back requests, thereby taking an unsafe vehicle off the streets and eliminating any risk of a re-possession or trade-in;
- paid Niedermeier the Jeep's full purchase price and paid financing debt, thereby providing her the cash needed to purchase a new, safe vehicle; and
- branded the Jeep as a lemon at that time, thus protecting any future potential buyers or lessees.

This is how the statutory scheme is supposed to work. (See pp. 16-20, *ante*.) Any offset that would incentivize contrary behavior by manufacturers—such as a trade-in offset—cuts against public policy.

Instead of examining whether the plain language might be consistent with a reasonable policy rationale, the Court of Appeal impermissibly weighed competing public policy concerns.

It accurately noted that "prior cases have rejected interpretations of the Act that allow manufacturers to benefit from delays in compliance" but then concluded that "[t]o the extent that concern exists here . . . *it is outweighed* by the consequences of interpreting the Act in plaintiff's favor, namely actively incentivizing *buyers* to introduce lemon vehicles into the used-car market without the labeling and notifications required of manufacturers who reacquire vehicles." (Opn. 24, italics added.)

In so holding, the Court of Appeal failed to acknowledge the reason *why* all prior cases have rejected such interpretations—namely, that letting manufacturers benefit from delayed compliance vitiates their incentive to comply with the Act. The existence of that reasonable policy rationale, even standing alone, defeats the court's decision.

The Court of Appeal likewise overlooked that the Legislature placed the onus for buying back and branding lemon vehicles entirely on *manufacturers*. Indeed, the Legislature imposed affirmative obligations on *manufacturers* to promptly replace or provide restitution for lemon vehicles (*Kirzhner, supra,* 9 Cal. 5th at p. 984) and imposed branding and notification requirements solely on *manufacturers* who re-acquire the vehicles (see §§ 1793.22, subd. (f), 1793.23, subds. (c)-(e)). It did not (1) require buyers to return vehicles to manufacturers to obtain the statutory remedies; (2) prohibit them from trading in vehicles or allowing re-possession; (3) require them to retain the vehicle while litigation is pending; or (4) impose *any* requirements on them other than to present the vehicle for repair.

The Act's plain language again reflects a reasonable policy choice: The Legislature chose to protect consumers in the used car market not by making lawsuits a less attractive option for harmed consumers—as the Court of Appeal's construction does—but by aggressively incentivizing *manufacturers* to promptly buy back and brand lemons. The Legislature declined to place the burden on consumers to ensure a manufacturer's compliance with *the manufacturer's own duties*, including declining to place a burden on consumers to hold onto lemons until the end of trial where, as here, manufacturers have willfully disregarded their buyback duties.

The Court of Appeal had no power to second-guess the Legislature's policy determinations. The Court, in its effort to prevent what it considered to be a windfall to buyers, swung the policy pendulum the other way by creating a windfall for manufacturers. That approach violates the Act's plain language and its core purpose.

The Court of Appeal's analysis also rests on flawed reasoning. The court concluded that "a ruling in plaintiff's favor here would render the branding and notification provisions largely meaningless, a result contrary to the rules of statutory construction." (Opn. 20.) But only manufacturers have the power to brand lemon vehicles. As a result, incentivizing *manufacturers* to *refuse* compliance with their buy-back and branding obligations—as the Court of Appeal's holding does—is what would render the branding and notification provisions "largely meaningless."

The Court of Appeal failed to recognize that when a manufacturer breaches its affirmative duty to promptly buy back a lemon and brand it *then*, there is a significant likelihood the car will *never* be branded. The car will likely be repossessed or traded in, pursuant to which it will remain unbranded. Buyers cannot force manufacturers to buy back and brand cars—indeed, Niedermeier asked Chrysler *three times* to buy back the Jeep, yet Chrysler refused even after being sued. Unlike Niedermeier, most consumers would have given up or settled, which undoubtedly is what Chrysler hoped would happen.

Thus, the Court of Appeal's policy analysis is exactly backwards: It would incentivize the only party capable of branding vehicles as lemons—the manufacturers—*not* to buy them back in the hopes of inducing a trade-in. The only way to prevent vehicles from avoiding the branding and notification process is to incentivize manufacturers to promptly buy back vehicles back *in the first place*.

Furthermore, the Court of Appeal's concern about incentivizing buyers to trade in lemons is overstated. Rejecting a trade-in offset will hardly trigger a buyer trade-in stampede. Buyers who end up with lemon vehicles want manufacturers to do what they are statutorily required to do—promptly fix the car or promptly buy it back. When they request a buy-back, as Niedermeier did multiple times, they want the manufacturer to promptly say "yes" and to pay the amount "paid or payable" so they can go purchase a new, safe car. Buyers don't want to sue. They don't want to have to scrounge up resources, and take on

more debt, to buy another new car while a lawsuit is pending. They don't want to have to battle the constant pressure to settle with a manufacturer that has the financial resources to drag out any lawsuit and to pay any verdict (even one imposing penalties).

As section 1793.2(d)(2)'s legislative history explains:

> "The fact is that very few consumers have the capacity or desire to be involved in legal action with a manufacturer. . . . Legal recourse is an undesirable option for a consumer because the costs, frustration, delays and legal action *are much more of a burden on the consumer than on the manufacturer*."

(8MJN/2077, italics added.) The Legislature recognized that buyers want manufacturers to do the right thing: buy back their cars. Period. Suing manufacturers and trading in lemons are options of last resort, not first.

In any event, the alternative to a trade-in—which a trade-in offset would promote by making trade-ins less palatable to buyers—is to saddle buyers with unsafe cars they may have no choice but to drive, endangering themselves and everyone on the road. It strains credulity to argue the Legislature wanted to encourage that result, but that's the inevitable upshot of the Court of Appeal's approach.

If manufacturers want a trade-in offset, their recourse is to petition the Legislature. Until then, section 1793.2(d)(2)'s plain language must govern.

3. The legislative history supports a "no offset" finding.

The legislative history likewise supports what the plain language says: No offset.

The Legislature undoubtedly knew that lemons could get traded in. (See, e.g., AA/125 [trial court recognizing that reasonable buyers will "trade in the vehicle for a replacement vehicle"]; 4MJN/927 [reference in 1987 amendment materials to vehicles "returned" to "some other dealer" than the one who sold the vehicle].) Yet there is nothing in section 1739.2's legislative history about offsets or deductions for traded-in vehicles or for *any* offset arising *after* a manufacturer fails to promptly buy back a vehicle. (See 1MJN/1–8MJN/2179.)

Instead, section 1793.2's legislative history shows a persistent effort to protect buyers of lemon vehicles by adding specific, comprehensive *express* standards to eliminate ambiguities and loopholes that manufacturers might exploit. (See pp. 13-19, *ante*.) It is implausible to assume, as Chrysler does, that the Legislature went to all the trouble to plug prior gaps and erase ambiguities with the specific formulaic standards set forth in section 1793.2(d)(2) yet at the same time intended to let manufacturers claim *unenumerated* offsets and deductions.

From start to finish, the Legislature has consistently sought to protect *buyers*—not manufacturers—of lemons: first by adopting new replacement/reimbursement remedies in 1970 for all product buyers; and then, after vehicle manufacturers

consistently refused to buy back lemon vehicles, repeatedly amending the Act to impose additional obligations designed to ensure that vehicle manufacturers *promptly* bought back lemons; and then after manufacturers tried to evade their duties to brand re-acquired cars as lemons, making those obligations more comprehensive too. (See pp. 13-20, *ante*; 1MJN/1–2MJN/588 [1970 Act]; 3MJN/590-827 [1982 amendments]; 3MJN/828–8MJN/2179 [1987 amendments]; 8MJN/2180–9MJN/2604 [1995 branding amendments].) And all without ever adopting a trade-in offset or imposing any limit on buyer remedies other than requiring buyers to present lemon vehicles for repair. The Legislature's focus has always been on curtailing manufacturer misconduct. A trade-in offset that promotes and rewards that misconduct is irreconcilable with that intent.

* * *

In short, Section 1793.2(d)(2)'s unambiguous language compels a finding that the Legislature did not intend a trade-in offset. Although the plain language renders other extrinsic aids irrelevant, the statutory purpose, public policy, and the legislative history further confirm the same.

If this Court agrees, it need read no further. The next two sections are merely fallback arguments presented in an abundance of caution.

II. If This Court Decides That A Trade-In Offset Can Be Implied Into the Act, It Should Limit The Offset To Manufacturers That Acted In Good Faith.

If this Court disagrees with the foregoing and reads the Act as allowing an implied trade-in offset, it should apply the collateral source rule to bar offsets to manufacturers, such as Chrysler here, who *willfully* violate their statutory buy-back obligations.[11]

Under the collateral source rule, a plaintiff's receipt "of payment for his loss from a source wholly independent of the wrongdoer" does *not* reduce the amount of damages owed by the defendant. (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349.) It makes no difference whether the payment is gratuitous or arises from an obligation. (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 887-888.)

The collateral source rule generally applies to claims, including those based on contract, where, as here, the "breach has a tortious *or wilful flavor*." (*City of Salinas v. Souza & McCue Constr. Co., Inc.* (1967) 66 Cal.2d 217, 227 (*City of Salinas*), italics added, disapproved on another ground in *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 14; accord

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[11] As explained above, the jury found that Chrysler willfully violated the Act and therefore awarded a civil penalty under section 1794, based on Chrysler's persistent refusal to repurchase Niedermeier's lemon after sixteen repair attempts and her repeated buy-back requests. (See pp. 22-28, *ante*.)

Patent Scaffolding Co. v. William Simpson Constr. Co. (1967) 256 Cal.App.2d 506, 511 [citing *City of Salinas* with approval].) "California appellate courts have long noted that the collateral source rule has been applied to breach of contract actions with a 'tortious or willful flavor.'" (*San Joaquin Valley Insurance Authority v. Gallagher Benefit Services, Inc.* (E.D.Cal. 2020) 437 F.Supp.3d 761, 771; see also *Parker v. Alexander Marine Co.* (9th Cir. 2017) 721 Fed.Appx. 585, 587-588 [applying collateral source rule to warranty claim, citing *City of Salinas*, where jury found breach was willful and plaintiff was entitled to a civil penalty under section 1794].)

The Legislature has already determined that manufacturers who willfully violate the Act's buy-back obligations must pay *more* than the consumer's actual loss. (See § 1794, subd. (c) [civil penalty provision].) This is because manufacturers who violate the Act have not just willfully breached express warranties; they have intentionally violated *statutory* and *public-policy* obligations by engaging in oppressive conduct toward vulnerable consumers. As section 1793.2(d)(2)'s legislative history recognizes, a manufacturer's failure to honor warranties after reasonable repair attempts is "oppressive, especially considering the harm caused to new car purchasers from the inconvenience, aggravation, loss of time, possible loss of earnings, and physical hazard from possible safety defects." (5MJN/1403.)

That fact counsels in favor of applying the collateral source rule to bar willful violators from claiming a trade-in offset,

thereby limiting any such offset to manufacturers that acted in good faith. Willful violators such as Chrysler should not be allowed to claim a trade-in offset.

III. If This Court Allows A Trade-In Offset And Declines To Limit The Offset To Manufacturers Acting In Good Faith, It Should Make Clear That The Offset May Be Applied Only *After* The Calculation Of The Civil Penalty For The Manufacturer's Willful Misconduct.

If, contrary to the Act's plain language and the collateral source rule, this Court lets willful violators seek a trade-in offset, then the Court should make clear that the offset must be applied to the buyer's total recovery *after* the calculation of the civil penalty under section 1794. Any other approach would potentially grant wrongdoers a *triple* offset for a trade-in credit—thereby frustrating the Legislature's intent and further incentivizing manufacturers to breach their affirmative obligation to promptly buy back lemons.

A. Applying a trade-in offset prior to calculating the civil penalty would undermine the penalty's purpose of deterring and punishing willful violators of the Act.

"[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the

defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan, supra,* 23 Cal.App.4th at p. 184.) The only way to protect the civil penalty's purpose of deterring and punishing manufacturers is to require application of the offset *after* the calculation of the civil penalty.

1. The penalty's deterrence purpose.

As shown, allowing *any* trade-in offset would substantially benefit manufacturers, giving them a windfall that incentivizes non-compliance with the Act. (See pp. 47-50, *ante*.) Applying that offset *before* a jury calculates the civil penalty makes matters even worse: It would magnify that windfall by reducing both the damages base *and* the civil penalty cap, potentially *tripling* the reduction in the manufacturer's potential liability.

A simple example illustrates the issue: If a jury awarded $50,000 in damages, it could award a civil penalty of up to $100,000—creating a maximum potential liability of $150,000. But if a $10,000 trade-in offset were applied to reduce the base for calculating the penalty to $40,000, the maximum penalty would drop to $80,000, reducing the maximum potential liability to $120,000—*three* times the offset's amount.

That approach would eviscerate the penalty's deterrence purpose by increasing a manufacturer's incentive to *not* promptly repurchase a lemon, in the hopes of inducing a trade-in. And, of course, the most defective vehicles—where the manufacturer's willful refusal to buy-back the vehicle is most egregious—are the ones that consumers are most likely to trade in so as to purchase

a safe vehicle. This means that applying the offset to the damages base would yield the greatest reward to the worst offenders—clearly an untenable result.

Of course, the best way to deter manufacturers from willfully violating their affirmative buy-back obligations is to deny a trade-in offset altogether. But if a trade-in offset is to be allowed, the Court should protect the penalty's deterrence purpose by holding that the offset must be applied to the plaintiff's total recovery *at the end*—that is, after the calculation of the civil penalty.

2. The penalty's punishment purpose.

Applying any trade-in offset after determining the civil penalty is also necessary to protect the penalty's punitive purpose. The civil penalty is meant to penalize the manufacturer for its intentional wrongdoing. Letting a manufacturer reduce its penalty based on *a third-party's* conduct—i.e., a dealer's trade-in credit on the purchase of a new vehicle—would let a manufacturer avoid full punishment by doing the very thing it should be punished for: not promptly buying back the lemon. And it would reduce the manufacturer's civil penalty exposure based on a *third party's* conduct, rather than because of any good-faith conduct by the manufacturer. Put differently: The civil penalty would decrease not because the manufacturer acted in good faith, but instead because the manufacturer continued to willfully violate the law by dragging its feet so long that a consumer got tired of waiting and traded in her vehicle.

The penalty is supposed to reflect the *manufacturer's* conduct. What a *third party* does should have no bearing on the *manufacturer's* penalty.

The present case demonstrates the problem. Because the Court of Appeal allowed the offset to be taken from the base damage amount, the $19,000 trade-in resulted in a $37,207.79 reduction to the damages that Chrysler was liable to pay. Thus, Chrysler multiplied its windfall for no other reason than it waited the consumer out—Chrysler got a discount of almost twice the amount of Niedermeier's trade-in, not a 1:1 reduction.

To avoid this injustice, the offset should be applied *after* the calculation of the civil penalty.

B. Overwhelming precedent supports applying a trade-in offset after calculating the civil penalty.

Courts have held in numerous analogous situations that a third party's payments to a plaintiff should *not* affect the calculation of statutory civil penalties owed by a defendant.

In *Newby v. Vroman* (1992) 11 Cal.App.4th 283, 288-289, for example, the Court of Appeal examined whether prejudgment interest owed by the defendant should be calculated on the amount of a judgment after deducting settlement amounts that joint tortfeasors paid plaintiff. The Court of Appeal held that the answer is no. It analogized the situation to the settled rule for calculating treble damages in antitrust cases: "[W]here a plaintiff in an antitrust suit sues multiple defendants for treble

damages, settles with one, and then prevails at trial against the remaining defendants. . . , the court must decide whether the amount paid in settlement should be credited before or after damages are trebled. *Without exception*, the courts have held that settlement payments should be deducted *after trebling* so that the plaintiffs can receive full satisfaction of their claim." (*Id.* at p. 289, italics added, citing *Burlington Industries v. Milliken & Co.* (4th Cir. 1982) 690 F.2d 380, 391-395; *Hydrolevel Corp. v. Am. Soc. of Mech. Engineers* (2d Cir. 1980) 635 F.2d 118, 130; and *Flintkote Company v. Lysfjord* (9th Cir. 1957) 246 F.2d 368, 398.)

Courts have applied this same settled antitrust rule—that a civil penalty is calculated *before* applying any offsetting payment or credit from a third party—to myriad other statutory civil penalties, under both state and federal law, in order to give full deterrent effect to the penalty. (See, e.g., *Liquid Air Corp. v. Rogers* (7th Cir. 1987) 834 F.2d 1297, 1310 [RICO claim, offset for property's return to plaintiff after litigation: "[S]etting-off damages *after* trebling is more likely to effectuate the purposes behind RICO," original italics]; *Morley v. Cohen* (4th Cir. 1989) 888 F.2d 1006, 1013 [RICO treble damage claim, offset for settlement payment]; *U.S. v. Hult* (9th Cir. 1963) 319 F.2d 47, 48 [civil penalty for trespass on timber land calculated before court applies any offset for timber's salvage value]; *Stewart Title Guar. Co. v. Sterling* (Tex. 1991) 822 S.W.2d 1, 9 ["The [Texas] Insurance Code provides for the trebling of actual damages, not for the trebling of recoverable damages. Therefore, by allowing a post-trebling credit, the punitive nature of the trebling provision

is given full effect . . . ."], disagreed with on other grounds by *Tony Gullo Motors I, L.P. v. Chapa* (Tex. 2006) 212 S.W.3d 299, 313; *Vining v. Martyn* (Fla.Dist.Ct.App. 1995) 660 So.2d 1081, 1082 [civil theft and conversion; settlement offsets applied after trebling]; *Vairo v. Clayden* (Ariz.Ct.App. 1987) 734 P.2d 110, 117 [Arizona racketeering statute; offsets applied after trebling]; *Emigrant Mortgage Company, Inc. v. Travelers Property Casualty Corp.* (D.Conn., Feb. 10, 2020, No. 3:16-CV-429 (SRU)) 2020 WL 616577, at *5 [Connecticut statutory theft provision: "trebling damages before deducting defendants' settlement amounts is consistent with how courts calculate treble damages in other statutory schemes with punitive damage provisions, under both Connecticut and federal law"]; *Primus Telecommunications, Inc. v. Toshiba of Europe, Ltd.* (E.D.Va., Sept. 22, 2009, No. 09-CV-10) 2009 WL 3064669, at *5 [civil penalty under Virginia's Business Conspiracy Act].)

All these cases recognize that, to effectuate the purpose of a civil penalty, a payment or credit from a third party (such as a trade-in credit) should be applied only to the manufacturer's total liability *after* the calculation of the civil penalty.

The same reasoning should apply here. The "actual damages" base for calculating the civil penalty under section 1794 should equal the *full* paid or payable amount (which includes the amount of any subsequent trade-in, including any loan extinguished through the trade-in) minus the pre-repair offset, plus incidental and consequential damages.

C. Applying the offset after the calculation of the penalty comports with the offset being a substitute for the vehicle's return to the manufacturer after trial.

Applying any trade-in offset after a jury calculates the civil penalty makes sense for another reason: The offset would be treated simply as the substitute for the buyer holding onto the vehicle until the lawsuit ended—that is, the status quo that would have existed but for the trade in.

Indeed, when lemon lawsuits go to judgment or settlement, and the buyer still possesses the vehicle, funds are received by the consumer and the manufacturer then recovers the vehicle, brands it a lemon, tries to fix it, and ultimately tries to sell it at a wholesale auction or export it overseas. Neither a jury verdict nor a settlement takes into account any funds the manufacturer might receive from any subsequent sale. Thus, a trade-in offset gives the manufacturer, in lieu of recouping the vehicle itself, a deduction for the amount of the trade-in as a stand in (albeit an inflated one, since the trade-in credit will always exceed the price a vehicle fetches at auction after being branded a lemon) for the vehicle being returned to the manufacturer.

Thus, logically any trade-in offset should apply to the buyer's total recovery at the end—that is, *after* the determination of the civil penalty—because that is when, but for the trade-in, the manufacturer would have recovered the vehicle.

CONCLUSION

The Act's plain language excludes a trade-in offset. There's no need to consider any other interpretive aids, but all such aids confirm that the Legislature meant what the plain language says: No offset.

Even if this Court were to conclude otherwise, it should bar willful violators from claiming any offset or at least hold that such offsets must be applied after the calculation of the civil penalty for willful misconduct.

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this Petitioner's Opening Brief on the Merits contains 13,989 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: June 1, 2021 s/ Cynthia E. Tobisman

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

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